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In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

ROBERT H. FINCH, SECRETARY OF HEALTH, EDUCATION
AND WELFARE, PETITIONER

v.

PEDRO PERALES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (App. A, *infra*, pp. 15-36) is reported at 412 F. 2d 44. The opinion of the court of appeals denying rehearing (App. B, *infra*, pp. 37-40) is reported at 416 F. 2d 1250. The opinion of the district court (App. D, *infra*, pp. 46-48) is reported at 288 F. Supp. 313.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1969 (App. C, *infra*, pp. 41-42). A timely petition for rehearing and suggestion of rehearing en banc was denied by the court of appeals on October 10, 1969. On December 30, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including March 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erroneously held that written medical reports, submitted by physicians who have examined a claimant for disability insurance benefits under the Social Security Act, cannot be deemed "substantial evidence" sufficient to support the denial of a disability claim if the reports have been contradicted by oral medical testimony and the claimant has objected to the admission of the reports into evidence.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. 401 *et seq.*, as amended, and of Title 20 of the Code of Federal Regulations, as amended, are set forth in Appendix E, *infra*, pp. 49-51.

STATEMENT

In April 1966, the respondent, Pedro Perales, applied for disability insurance benefits under the Social Security Act, alleging that he became disabled

on September 29, 1965⁵, at the age of 33, as the result of a back injury (Tr. 178-181).¹ Perales had been treated for this injury by a neurosurgeon, Dr. Muns-
low, who had performed remedial surgery upon him in November 1965 (Tr. 202). After the surgery, Dr. Muns-
low and a neurologist, Dr. Lampert, were un-
able to explain Perales' continued complaints (see Tr. 242, 243, 251-252), and, in April 1966, Perales put himself in the care of a general practitioner, Dr. Morales (see Tr. 204).

As required by the Act (42 U.S.C. 421), Perales' claim for disability benefits was referred to a State agency for initial determination. As is customary, the State agency arranged for medical examinations of the claimant, at no cost to him, by consultant physicians selected from a list of those who had agreed to make such examinations and to report their findings. The claimant was examined by an orthopedic surgeon, Dr. Langston, who referred him to a Dr. Mattson for an electromyographic study, and by a psychiatrist with a subspecialty in neurology, Dr. Bailey. Those physicians each submitted reports reflecting their examinations of the claimant (Tr. 212-214, 220-222, 225-227, 232).

The State agency denied his claim, and Perales requested a hearing before a federal hearing examiner. See 42 U.S.C. 405(b), 421(d). The notice setting the hearing (Tr. 29-30) advised him, *inter alia*, to bring hospital records and reports from doctors who

¹"Tr." references are to the pages of the transcript of the administrative proceedings.

had treated him, and informed him that he could examine the documentary evidence in the case, either on the day of the hearing or at the hearing examiner's office prior to the hearing. The Act gives the Secretary subpoena power (42 U.S.C. 405(d)), and a regulation of the Secretary provides that a claimant may request subpoenas for the attendance of witnesses and establishes the conditions upon which such subpoenas may issue. 20 C.F.R. 404.926 (App., *infra*, p. 49). The claimant, who was represented by counsel, did not request any subpoenas for either the original or the supplemental hearing.

At the two hearings, claimant's counsel objected to the introduction of the written reports of the consultants, Drs. Langston, Mattson and Bailey, and to several reports of the claimant's former treating physicians, Drs. Munslow and Lampert (Tr. 241, 242, 243, 251),² on the grounds that the reports were hearsay and that their authors would not be present for cross-examination (Tr. 35-39, 130-131, 134). The objections were overruled, and all of those reports, as well as those of the claimant's treating physician, Dr. Morales, were admitted into evidence (Tr. 39, 131, 134). Oral testimony was presented by the claimant and by Dr. Morales, as well as by a former fellow employee of the claimant, by a vocational expert, and

² Those reports were contained in a file furnished by the Texas Employment Commission (Tr. 239-250), before which the claimant's workmen's compensation claim was then pending. After claimant's objections to the admission of that file were overruled, his counsel then produced four other reports written by Dr. Munslow which were admitted into evidence (Tr. 140).

by an expert medical witness (who had not examined the claimant), Dr. Leavitt.*

The hearing examiner held, in reliance upon the written medical reports, that the claimant was not disabled (Tr. 10-21). Upon review by the Appeals Council, the claimant was permitted to introduce additional evidence which included the written report of a Dr. Williams, an orthopedic surgeon who had examined the claimant subsequent to the hearing (Tr. 259-260). The Appeals Council upheld the decision of the hearing examiner (Tr. 1).

The claimant then brought this action in the district court under 42 U.S.C. 405(g), seeking review of this decision, which constituted the Secretary's final determination. Both parties moved for summary judgment on the basis of the administrative transcript, the Secretary asserting, and the claimant contesting, that the administrative decision was supported by substantial evidence. See 42 U.S.C. 405(g) (App., *infra*, p. 49). The district court reversed the Secretary's decision and ordered a new hearing, on the ground that written medical reports "should [not] be received and considered, over objection," because their admission "would have the effect of denying to the opposition an opportunity for cross-examination" (App., *infra*, pp. 44, 47).

*Dr. Leavitt, who is board-certified in physical medicine and rehabilitation (Tr. 134), was called by the hearing examiner as a "medical advisor," *i.e.*, a physician who does not examine the claimant but who, as an expert witness, explains the significance of the medical evidence in the case and offers an opinion on the claimant's condition based on that evidence.

On appeal, the court of appeals held that the Social Security Act and the regulations thereunder permitted the admission into evidence of written medical reports (App., *infra*, pp. 22, 26). It further held that the claimant could not complain of the "denial" of the right to cross-examine the authors of the reports, since he had not sought to subpoena them (App., *infra*, pp. 24-25). The court of appeals ruled, however, that because the written medical reports were "uncorroborated hearsay," they could not be regarded as substantial evidence upon which the Secretary could base a determination of non-disability (App., *infra*, pp. 27-32).

The Secretary then filed a petition for rehearing and suggestion of rehearing en banc. In an opinion denying rehearing, the panel explained that its ruling—that "uncorroborated hearsay" could not constitute substantial evidence—was applicable only if the claimant had objected to the hearsay and the hearsay was "directly contradicted" by the claimant and by oral medical testimony (App., *infra*, p. 38).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question in the administration of the Social Security Act involving the principles of evidence the Secretary may follow in determining disability claims. For many years the Secretary has placed substantial reliance upon written reports by doctors who have examined the claimant and has accepted the reliable expert judgments in such reports even though the experts themselves did not testify at the hearing. Prior to the decision below,

such reports generally had been viewed as constituting substantial evidence upon which the Secretary could rest a finding of non-disability. In the present case, however, the court of appeals has rejected the Secretary's long-accepted use of such evidence and instead has announced the novel rule that, without regard to the probity and reliability of the particular reports involved, they cannot constitute substantial evidence of non-disability if they are contradicted by any medical testimony at the hearing.

The rule announced is a sweeping one that is bound to have a substantial impact upon a large number of cases. There are pending in the district courts within the Fifth Circuit 300 cases in which the Secretary's denial of disability claims is challenged; in the rest of the country there are approximately 1700 additional cases pending; and roughly 1400 such cases are filed every year. The Social Security Administration holds about 23,000 hearings annually in disability cases. A substantial portion of social security disability cases in which judicial review is sought are brought in the Fifth Circuit, where this decision controls. In addition, it is bound to have an unsettling effect in other circuits.

Thus, the decision below not only will govern the large number of cases that arise in the Fifth Circuit, but is virtually certain to cause extensive litigation in other circuits. Moreover, as shown in point 4, *infra*, the prohibition upon the Secretary's use of reports of medical experts who do not appear as witnesses (where contrary medical testimony is presented by the claimant) would create serious problems for the

proper functioning of the social security system. A decision announcing a new rule of evidence that has such far-reaching impact upon the operation of a major federal program warrants review by this Court.

2. The basic error of the court of appeals was its failure to recognize, as this Court has repeatedly held, that "substantial evidence" sufficient to support an administrative determination is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," or, in other words, "evidence having rational probative force." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229, 230; *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300; *Unversal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477; *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620. Under these decisions, technical rules of evidence, such as the hearsay rule, are not determinative, since the probative value of both hearsay and non-hearsay evidence varies widely. The proper inquiry is whether the evidence upon which the particular administrative decision rests is probative and reliable, not whether it is to be labeled "hearsay" or "direct."

The administrative determination here was based on written medical reports prepared by qualified independent consultants who examined the claimant. Despite the inherent reliability and obvious probative value of such reports in ascertaining a claimant's condition, the court below refused to permit the Secretary's decision to rest on them, solely because they are technically "hearsay."

In so ruling, the court of appeals relied on the statement in the *Consolidated Edison* case, *supra*, that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." 305 U.S. at 230. That statement must, of course, derive its meaning from the context in which it was made, for, read more broadly, it would have been inconsistent with the remainder of the opinion, which emphasized the probative force, rather than the technical characterization, of the evidence.

Accordingly, other courts of appeals⁴ and leading commentators⁵ have concluded, in contrast to the court below, that this Court's opinions do not, and should not, require reviewing courts to set aside administrative findings merely because they are not supported by at least a "residuum" of legally admissible evidence.

3. Regardless of whether this so-called "residuum rule" has any rightful place in judicial review of administrative proceedings generally, its application here by the court below is particularly inappropriate in view of the flexible procedures established by Congress and the Secretary for the resolution of disability claims.

⁴ *Ellers v. Railroad Retirement Board*, 132 F. 2d 636, 639 (C.A. 2); *Marmon v. Railroad Retirement Board*, 218 F. 2d 716, 717 (C.A. 3). But see *National Labor Relations Board v. Imparato Stevedoring Corp.*, 250 F. 2d 297, 302-303 (C.A. 3) (*dictum*).

⁵ See 1 Wigmore, *Evidence*, § 4b, pp. 40-42; 2 Davis, *Administrative Law Treatise*, § 14.10, pp. 292, 293; 2 Larson, *Workmen's Compensation*, § 79.23, pp. 292-293. See, also, McCormick, *Handbook of the Law of Evidence*, p. 627.

The Social Security Act expressly provides that "Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure" (42 U.S.C. 405(b))—a standard that seemingly contemplates the use of hearsay. The Secretary has left the "procedure at the hearing generally" to "the discretion of the hearing examiner," but has directed that that procedure be "of such nature as to afford the parties a reasonable opportunity for a fair hearing." 20 C.F.R. 404.927 (App., *infra*, p. 51). Hearing examiners customarily receive into evidence medical reports written either by a claimant's treating physicians or by the independent consultant physicians who examined the claimant. And, as previously noted, a hearing examiner may, at the request of a claimant, issue subpoenas for oral testimony upon a proper showing of need. 20 C.F.R. 404.926 (App., *infra*, pp. 49-50).

Although the claimant here did not seek to subpoena any witnesses, he asserted that the admission of written medical reports denied him the opportunity to cross-examine the consultant physicians and his former treating physicians. As the court below correctly recognized (App., *infra*, pp. 20-26), however, hearsay is properly admissible in administrative proceedings, and the procedure established by the Secretary for the issuance of subpoenas provides adequate opportunity for cross-examination when needed. Somewhat inconsistently, however, the court ruled that the Secretary could not rely on this admissible hearsay evidence when it was contradicted by testimonial evidence introduced by the claimant.

Where, as here, the claimant failed to suggest any reason why the physicians should be called upon to give oral testimony explaining their reports, the reliability and probative value of the reports would seem all the greater. Yet the court below held that, whenever a physician testifies orally on behalf of a claimant (as did the claimant's general practitioner here) and contradicts other physicians' written reports, the Secretary cannot rely upon those reports unless at least one of the authors thereof testifies to "corroborate" the otherwise "uncorroborated hearsay" in the reports. But, as previously noted, the procedure established by Congress and the Secretary gives a claimant ample opportunity to show directly that such testimony is, in fact, needed.

4. Under the holding below, such testimony will be required in a large category of cases without any showing of need; if the decision stands, it will seriously impair the administration of the disability provisions of the Act. There is no way in which, in advance of the hearing, it could be ascertained which expert medical witnesses would be required to testify. Requiring the oral testimony of a consultant physician at each of the 23,000 hearings held annually in Social Security cases,⁶ instead of only in those in which the need therefor has been shown, would result in a serious, unnecessary drain on the productive

⁶ At an estimated \$100 per hearing, the cost of testimony by a consultant physician at each such hearing would be some \$2 million per year. The expense would be borne by the trust fund, which Congress was concerned to protect from the drain of "unwarranted costs." See H. Rep. No. 2936, 84th Cong., 2d Sess., p. 26.

time (already in critically short supply) of practicing physicians. Moreover, this prospect would threaten disruption of the entire process of administering the disability insurance program.

For, as explained above, consultant examinations are ordinarily performed prior to the hearing stage. At the time he is requested to conduct an examination, a consultant physician is, of course, unable to predict whether the claim involved will ultimately go to hearing. Prior to the decision below, however, he could expect that, even if a hearing were to be held, his oral testimony would not ordinarily be required. That decision, by making it far more likely that he will be required to testify orally, threatens to make many physicians reluctant to conduct such examinations.⁷

This result poses a threat to the administration of the program that is of concern not only to the Secretary but to claimants, for reports from the consultants often furnish the basis for the allowance of a claim prior to hearing.⁸ Perhaps, as the court below said, "if a doctor refuses to serve, another can be obtained" (App., *infra*, pp. 39-40). But that risk should

⁷ In the petition for rehearing in the court of appeals, the Commissioner of Social Security stated that, based on his experience, on the views of his Medical Advisory Committee (a body of physicians which consults with and advises him concerning the operation of the disability program), and on the views of State agency directors concerning the attitudes of local physicians, this consideration would make physicians "refuse to conduct the consultative examinations."

⁸ Almost two-thirds of all disability claims (of which more than 750,000 are filed annually) are allowed prior to the hearing stage of the administrative process.

not needlessly be imposed on those dependent on this program.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.*

Respectfully submitted.

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WILLIAM D. RUCKELSHAUS,

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Attorneys.

MARCH 1970.

*Even though the case has been remanded for further proceedings, the decision constitutes a final determination of the question presented in this petition.

APPENDIX A

In the United States Court of Appeals for the Fifth
Circuit

No. 26238

WILBUR J. COHEN, SECRETARY OF HEALTH, EDUCATION,
AND WELFARE, APPELLANT

versus

PEDRO PERALES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

(May 1, 1969)

Before COLEMAN and GOLDBERG, Circuit Judges, and
SKELTON, Judge of the Court of Claims*

SKELTON, *Judge*.

Pedro Perales, Appellee, hereinafter called claimant, filed an application for social security benefits in April 1966, claiming that a back injury received by him on September 29, 1965, had disabled him. This application was filed with the Secretary of Health, Education and Welfare, hereinafter called "the Secretary" or "HEW," under 42 U.S.C.A., Sections 416 (i)(1) and 423 of the Social Security Act. His application was disapproved, and, thereafter, he requested and was granted a hearing before an examiner. The hearing consisted of two sessions, the first of which was held in San Antonio, Texas, on January 12, 1967.

*Sitting by designation as a member of this panel.

The supplemental hearing was held on March 31, 1967.

At the hearings, the examiner offered and introduced into evidence, over the objection of claimant's attorney, a number of unsworn medical reports of doctors who had examined the claimant but who were not present at either hearing and did not testify. The claimant objected to this evidence on the ground it was hearsay and its admission deprived him of the right to be confronted by witnesses who were against him and of the right to cross-examine them. The examiner overruled the objections and received the reports into evidence.

The examiner also allowed a Dr. Lewis A. Leavitt to testify over the objection of claimant. He had been flown from Houston to San Antonio by HEW to testify as an expert in the case. He had never examined the claimant and his testimony consisted of his "interpretation" of the medical reports of the absent doctors mentioned above. The claimant objected to this testimony because it was hearsay based on hearsay and because the witness' answers were not confined to hypothetical questions. Actually, he was not asked any hypothetical questions. The examiner allowed this witness to "interpret" the reports of the absent doctors in such a way as to indicate that claimant was not disabled.

The only direct evidence from live witnesses bearing on the physical condition of the claimant was that of the claimant himself and one Dr. Max Morales, who had examined and treated him. This evidence showed that the claimant was disabled and supported his claim for the social security benefits.

After the second hearing, the examiner determined, on May 12, 1967 that the claimant was not entitled

to disability benefit

by the Appeals Council. The claimant requested a review 1967, he was notified on June 16, 1967, and on July 20, approved the examination that the Appeals Council had its affirmance of the examiner's denial of his claim and that decision of the Secretary is decision constituted the final decision of the Secretary in his case.

The claimant appealed his case to the United States District Court for the Western District of Texas. After HEW filed its answer, both parties filed motions for summary judgment. The court heard the motions, and on February 13, 1968, denied both motions and reversed the decision of the Secretary denying the relief sought, and remanded the cause to the Secretary for a full new hearing. In addition to the order before a different examiner. In a memorandum of February 13, 1968, the court filed which contains both opinion in the case on August 13, 1968, orders that were included in his order of remand of February 13, 1968.

The Secretary claimed that the claimant filed an appeal on the ground that the motion here to dismiss the appeal was interlocutory and not appealable. We entered an order carrying the appeal and not appealable. We entered an order carrying the appeal and not appealable. We entered an order carrying the appeal and not appealable.

The three basic questions to be decided here are: (1) Was the decision of the trial court an appealable one? (2) Is hearsay evidence, when objected to, admissible in an administrative agency hearing such as the HEW hearing in this case? (3) If hearsay evidence is admissible over objection in an administrative agency hearing, such as that of the HEW in this case, is such hearsay evidence as that of the HEW in this case, is more, substantial evidence?

We will consider the evidence, standing alone and without It is our view evidence?

over these questions in the order given. That this case is an appealable one.

We think this question is governed by the provisions of 42 U.S.C. § 405(g) which provides:

* * * *

(g) The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. * * * The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary * * *. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

It will be noted that this statute authorizes the court to enter a judgment "affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." The statute also states that such judgments "shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." Of course, 28 U.S.C. 1291 gives the courts of appeals jurisdiction to review appeals from all final decisions of the district courts.

It appears clear to us that here where the district court entered an order denying the motions for summary judgment and reversing the decision of the Secretary and remanding the case to the Secretary for a full new hearing, in accordance with his order of remand, the case is an appealable one. See *Jamieson v. Folson*, 7 Cir., 1963, 311 F. 2d 506, *cert. denied*, 374 U.S. 487, 83 S. Ct. 1868, 10 L. Ed. 2d 1043

(1963); *Gardner v. Moon*, 8 Cir., 1966, 360 F. 2d 556, 558; and *Celebrezze v. Lightsey*, 5 Cir., 1964, 329 F. 2d 780.

Also we think the remand order is final within the meaning of 28 U.S.C. 1291. The finality requirement of this section has usually been given a practical rather than a technical construction. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964).

It should be noted that not all orders under 42 U.S.C. § 405(g) are appealable. In situations where the Secretary moves the court before he files an answer, or at the request of either party, the court remands the case for additional evidence, the order would not be appealable. An order remanding the case for additional or supplementary evidence, without a review by the court of the administrative record nor a decision by it on the substantial evidence question, is without doubt an interlocutory order and is not appealable. Likewise, an order *sua sponte* by the court for the taking of additional evidence is not appealable. *Bohms v. Gardner*, 8 Cir., 1967, 381 F. 2d 283, *cert. denied*, 390 U.S. 964 (1968).

In the case before us, the court not only denied the motions for summary judgment and reversed the decision of the Secretary, but also established standards for the admission of hearsay evidence and indicated that hearsay evidence is not substantial evidence. Unless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved, because on the next appeal, if there is one, the sole question may be the substantiality of the evidence, and not its admissibility. This seems to us to fit the

rationale of the decision in *Cohen v. Beneficial Loan Corp.*, *supra*, where the court said:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. * * *. *Id.* at 546.

Accordingly, we conclude that the case is an appealable one, and we deny the motion of appellee (claimant) to dismiss the appeal.

We next consider the question of whether or not hearsay evidence, when objected to, is admissible in an administrative hearing, such as the hearing in this case. The claimant contends that the admission of hearsay evidence denies him the right to be confronted by his adversary witnesses and the right of cross-examination. We must look first to the statute enacted by Congress governing this problem. We find that 42 U.S.C. § 405 (a) and (b) provides:

(a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnish-

ing the same in order to establish the right to benefits hereunder.

(b) Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

Also, it must be noted that in accordance with the statute quoted above, the Secretary has promulgated the following rules and regulations with respect to evidence and procedures to be followed in hearing before him:

20 C.F.R. 404.926 provides, in pertinent part:

When reasonably necessary for the full presentation of a case, a hearing examiner or a member of the Appeals Council, may, either upon his own motion or upon the request of a party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents which are relevant and material to any matter in issue at the hearing. Parties who desire the issuance of a subpoena shall, not less than 5 days prior to the time fixed for the hearing, file with the hearing examiner or at a district office of the Administration a written request therefor, designating the witnesses or documents to be produced, and describing the address or location thereof with sufficient particularity to permit such witnesses or documents to be found. The request for a subpoena shall state the pertinent facts which the party expects to establish by such witness or document and whether such facts could be established by other evidence without the use of a subpoena. * * *

20 C.F.R. 404.927 provides, in pertinent part:

* * * The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. * * * The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion to the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

20 C.F.R. 404.928 provides, in pertinent part:

Evidence may be received at the hearing even though inadmissible under rules of evidence applicable to court procedure * * *.

It will be observed that the above statute as well as the regulation issued by the Secretary provide that:

Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

This provision of the statute and regulation clearly authorize the admission of hearsay evidence into the record of an administrative hearing of the HEW such as that involved here. The claimant and the Bexar County Legal Aid Society, who appear here as an *amicus curiae*, contend that the Administrative Procedure Act entitles the claimant to the right of cross-examination and that the admission of hearsay evidence denies him that right. They cite the provision of the Act in 5 U.S.C. § 556(d) which provides:

* * * A party is entitled to present his case or defense by oral or documentary evidence to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

However, the Administrative Procedure Act further provides that its provisions:

* * * [D]o not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute.¹

We conclude that the Administrative Procedure Act does not control the method of conducting hearings under the Social Security Act, if in conflict therewith, and the right of cross-examination provided for in the former will not prevail over the procedures established by the Secretary under the latter statute.

The claimant points to the case of *Southern Stevedoring Co. v. Voris*, 5 Cir., 1951, 190 F. 2d 275, as authority for the inadmissibility of hearsay medical reports. We do not think that case is controlling here for several reasons. In the first place, the provisions of the two laws involved are different. In the next place, the inadmissibility of the reports was being asserted there by a party against whom a money judgment was sought. That is quite a different situation to that existing in the case at bar. Here, the claimant is claiming disability benefits under a law of Congress. In such a case the Congress has the right to establish procedures and regulations the claimant must comply with before he is entitled to these benefits. So long as these procedures are not unfair, arbitrary, discrimi-

¹ 5 U.S.C. § 556(b).

natory, and do not deprive the claimant of the opportunity to present his claim in an adequate and comprehensive manner, he is required to comply with them. Furthermore, in the *Southern Stevedoring Co.* case, *supra*, the court held that the provisions of the Administrative Procedure Act as to cross-examination applied in that case. The court said:

* * * Moreover, sec. 7(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1006(c), expressly provides that "Every party shall have the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts. *Id.* at 277.

We have already pointed out that this section of the Administrative Procedure Act does not apply to hearing procedures under the Social Security Act which is involved here.

The claimant complains of the admission of hearsay evidence and the denial of confrontation of adverse witnesses and the right of cross-examination as if they were all one and the same. Actually, they are different and must be treated separately. While it is true that the admission of hearsay testimony denies the claimant the right of cross-examination, at least temporarily, still, he has his remedy under the regulations issued by the Secretary. These regulations give the hearing examiner the authority to subpoena witnesses on his own motion or at the request of a party.² While it is true the regulations require a party to request subpoenas for witnesses five days before the hearing, and a claimant might not know at that time what witnesses he would need to subpoena in order to cross-examine the authors of hearsay evidence to be introduced by

² 20 C.F.R. 404.926, *supra*.

the Secretary, still he could ask for a postponement or a supplemental hearing in order that he might have the witnesses present. If this was refused, he would have a valid objection that could be urged on appeal. But that is not the case here. Actually, there was a supplemental hearing in this case. The claimant could have requested subpoenas for the absent doctors requiring them to be present at the later hearing, but he did not do so. The cases are clear that where a party has the right to subpoena witnesses by requesting the agency representative to issue them, and he does not make the request, he cannot later complain of the fact that he has been denied the right of confrontation of adverse witnesses and the right of cross-examination. See *Williams v. Zuckert*, 371 U.S. 531, 83 S. Ct. 403, 9 L. Ed. 2d 486 (1963) and 372 U.S. 765, 83 S. Ct. 1102 10 L. Ed. 2d 136 (1963); *Begendorf v. United States*, 169 Ct. Cl. 293, 340 F. 2d 362 (1965); *McTierman v. Gronouski*, 2 Cir., 1964, 337 F. 2d 31, 37.

However, as pointed out above, this is entirely different to the objection of claimant to the admission of hearsay evidence. The correct rule as to the admission of hearsay evidence by an administrative agency was stated by the court in *Morelli v. United States*, 177 Ct. Cl. 848, 853-54 (1966) as follows:

* * * [T]he hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value.

To the same effect is *Montana Power Co. v. Federal Power Commission*, D.C. Cir., 1950, 185 F. 2d 491, 497, cert. denied, 340 U.S. 947, 71 S. Ct. 531, 95 L. Ed. 683 (1951); and *Willapoint Oysters, Inc. v. Ewing*, 9 Cir., 1949, 174 F. 2d 676, 690, cert. denied, 338 U.S. 860, 70 S. Ct. 101, 94 L. Ed. 527 (1949).

We conclude that the hearsay evidence in this case was admissible under the Social Security Act. See *Rocker v. Celebrezze*, 2 Cir., 1966, 358 F. 2d 119, 122. However, this does not solve the entire problem in the case. The overriding issue and the one that actually and properly concerned the trial court was whether or not the hearsay evidence received by the examiner was substantial evidence on which he could base his decision. While the trial court did not specifically decide this question, his order of remand and memorandum opinion made reference to it, and for all practical purposes held the hearsay evidence was not substantial evidence.* Since the problem will arise in the next trial of the case, and is involved in three other cases

* The memorandum opinion stated in part as follows:

Except in unusual circumstances, and none are shown to exist in this case, this Court is reluctant to accept as substantial evidence the opinions of medical experts submitted as original evidence in the form of unsworn written reports, the admission of which would have the effect of denying to the opposition an opportunity for cross-examination. *Ratliff v. Celebrezze*, 338 F. 2d 987, 982 (6 Cir. 1964); *Mullen v. Gardner*, 256 F. Supp. 588 (E.D.N.Y. 1966).

Similarly, the opinion of a doctor who has never examined or treated a claimant, is entitled to little or no probative value, especially when it is opposed by evidence of a substantial nature, including the oral testimony of an examining physician. See *Hayes v. Gardner*, 376 F. 2d 517 (4 Cir. 1967).

Certainly, therefore, in a situation where, as here, unsworn medical reports of examining physicians are received as original evidence on the critical issue of plaintiff's physical condition, a non-examining medical expert is then allowed to "interpret" those *ex parte* reports, and that "interpretation" forms the basis for the decision by the hearing examiner, we have what amounts to pyramiding hearsay upon hearsay, which, under the circumstances of this case, violates the fundamental rule of fair play and cannot be permitted to stand. *Id.* at 1a(S) and 2a(S) of Supplemental Record.

now held in suspense,⁴ we will consider it here for the benefit of the Secretary and the trial court.

This brings us to a consideration of the third question mentioned above, namely, is the hearsay evidence in this case, standing alone and without more, substantial evidence?

The Supreme Court defined substantial evidence in *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300, 59 S. Ct. 501, 83 L. Ed. 660 (1939) as follows:

* * * [F]indings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U.S. 142; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197; *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board v. Thompson Products Inc.*, 97 F. 2d 13; *Ballston-Stillwater Knitting Co. v. National Labor Relations Board*, 98 F. 2d 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. National Labor Relations Board*, *supra*, p. 229, and it must be enough to justify, if the trial were to

⁴The trial court is now holding in abeyance three other cases involving the same issues as those involved here, awaiting the outcome of this case. They are *Baker v. Cohen*, No. 26670; *Cohen v. Riley*, No. 26247; and *Cohen v. Hammonds*, No. 26243.

a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, 524; *Gunning v. Cooley*, 281 U.S. 90, 94; *Appalachian Electric Power Co. v. National Labor Relations Board*, *supra*, 989.⁸

The rule announced in the *Morelli* case *supra*, and the other cases cited above, allow hearsay evidence to be received by administrative agencies "so long as the evidence upon which a decision is ultimately based is both substantial and has probative value." (Emphasis supplied.) The Supreme Court held many years ago in the case of *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230, 59 S. Ct. 206, 83 L. Ed. 126 (1938):

* * * Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

In *Willapoint Oysters, Inc. v. Ewing*, *supra* the court said:

* * * "[S]ubstantial evidence" includes more than "uncorroborated hearsay" * * *. *Id.* at 691.

In *Hill v. Fleming*, 169 F. Supp. 240 (W.D. Pa. 1958), the court held:

⁸ See also *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966); *Coomes v. Ribicoff*, 209 F. Supp. 670, 671 (D. Kan. 1962); *Sandusky v. Celebrezze*, 210 F. Supp. 219, 223 (W.D. Ark. 1962); *Clifton v. Celebrezze*, 228 F. Supp. 251, 255 (N.D. Tex. 1964); *Scott v. Celebrezze*, 241 F. Supp. 733, 736 (S.D.N.Y. 1965); *Farnsworth & Chambers Co. v. United States*, 171 Ct. Cl. 30, 37-38, 345 F. 2d 577, 582 (1965); *Loral Electronics Corp. v. United States*, 181 Ct. Cl. 822, 832, 387 F. 2d 975, 980 (1967); Robert M. Viles, *The Social Security Administration Versus The Lawyers* * * * *And Poor People Too*, 40 Miss. L.J., 24, 36-52.

In our opinion these hearsay statements, in the light of the whole record, are not substantial evidence * * *. A finding of ultimate fact not reasonably supported by substantial evidence should be set aside. * * * *Id.* at 244.

Mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Id.* at 245.

In *United States v. Krumsiek*, 111 F. 2d 74, 78 (1st Cir. 1940), the court stated:

Conclusion of facts must be supported by substantial evidence. * * * "Substantial evidence is more than a mere scintilla. * * * Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.* at 78.

In 32A C.J.S. Evidence § 1016 (1964), it is stated:

* * * Mere uncorroborated hearsay or rumor does not constitute substantial evidence, nor does inherently improbable testimony, a guess, or surmise, conjecture, or speculation. *Id.* at 631.

In *Frank Camero v. United States*, 170 Ct. Cl. 490, 493-94, 345 F. 2d 798, 800 (1965), the court held:

* * * The Supreme Court has construed "substantial evidence" to be "* * * more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Court added (at 230), "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." * * *

The *Consolidated Edison Co.* case, *supra*, is unquestionably a correct statement of the law. See *NLRB*

v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 257, 59 S. Ct. 490, 83 L. Ed. 627 (1939); *NLRB v. Columbian Enameling & Stamping Co.*, *supra*; and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951).

In *Willapoint Oysters, Inc. v. Ewing*, *supra*, the court held that hearsay evidence was admissible in an agency hearing, saying:

* * * The receipt of irrelevant, immaterial and hearsay evidence is no cause for reversal of an administrative order though the validity of the order can never rest upon conjecture, guess or chance. *Id.* at 690.

However, the court stated that the findings must be in accord with substantial evidence, and could not be based on hearsay alone, stating:

* * * However, since "substantial evidence" includes more than "uncorroborated hearsay" and "more than a mere scintilla," the findings, to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla. * * * [Emphasis supplied.] *Id.* at 691.

We think the court correctly stated the law in *NLRB v. Amalgamated Meat Cutters*, 9 Cir. 1953, 202 F. 2d 671, 673, when it said:

* * * [A]gency findings "cannot be based upon hearsay alone".⁶

⁶ The case here is to be distinguished from the case of *James Alvin Peters v. United States*, — Ct. Cl. — [No. 426-66, March 14, 1969], in which the writer dissented, where the court held that the alleged hearsay evidence was admissible as a declaration against interest and as an exception to the hearsay rule.

The testimony of the "expert" Dr. Leavitt, cannot serve to corroborate the hearsay reports of the absent doctors. His testimony was correctly described by the trial court as "hearsay on hearsay." Multiple hearsay is no more competent than single hearsay. *United States v. Grayson*, 2 Cir., 1948, 166 F. 2d 863, 869; *United States v. Bartholomew*, 137 F. Supp. 700, 709 (W.D. Ark. 1956).

Accordingly, we hold that mere uncorroborated hearsay or rumor does not constitute substantial evidence.⁷

Furthermore, the agency must look at the record as a whole and not just to the part of it that coincides with its views. *Universal Camera Corp. v. NLRB*, *supra*; *Farnsworth & Chambers Co. v. United States*, *supra*; *Loral Electronics Corp. v. United States*, *supra*.

Applying these principles to the case before us, it is clear that the hearsay reports of the absent doctors were admissible in evidence before the hearing examiner. This is also true with respect to the testimony of the so-called "expert" Dr. Leavitt. However, this leaves the Secretary with nothing but uncorroborated hearsay, which the claimant has objected to, on which to base his decision. Under the decisions, such evidence is not substantial evidence. This is especially true in view of the fact that on the other side of the case we have the live and direct legal testimony of the claimant and his doctor which supports his claim. The trial court was correct in his remarks in the record that if he was called upon to render a final judgment in the case, he would render it for the claimant and against the secretary, because the only probative evidence in the case that was not hearsay and that was substantial

⁷ See also *Conn v. United States*, 180 Ct. Cl. 120, 130, 376 F. 2d 878, 883 (1967).

was in favor of the claimant.* We agree that he would have been justified in entering judgment for the claimant for disability benefits in view of the foregoing and based on the law announced by the courts in other similar cases, a discussion of which follows:

The case of *Mefford v. Gardner*, 6 Cir., 1967, 383 F. 2d 748, 759-61, was very similar to the case before us. The claimant and his doctors who had treated him testified he was disabled. The examiner had an "expert" doctor (Dr. London) to examine the various medical reports the examiner had introduced and then testify, without ever having seen or treated the claimant, to the effect the claimant was not disabled. This is exactly what Dr. Leavitt did in the case here. The court in that case held that such testimony was not substantial evidence, stating:

Such a statement as Dr. London's cannot be considered substantial evidence in view of the fact that he never saw or examined appellee, and in face of the medical evidence of physicians who not only treated him over a long period of time but also examined him and came to the determination that he was totally and permanently disabled. *Id.* at 759.

The case of *Hayes v. Gardner*, 4 Cir., 1967, 376 F. 2d 517, is another instance where this same procedure was followed. There a Social Security Administration doctor, named Dr. Glendy, did not examine the claimant but based his testimony that the claimant was not disabled on an examination of the medical record. The claimant and the doctor who had been treating her testified she was disabled. The court held that

* See pp. 36a and 37a of the Record.

Dr. Glendy's testimony was not substantial evidence. In this connection, the court said:

* * * We reach the conclusion that, * * * the opinion of a doctor who never examined or treated the claimant *cannot serve as substantial evidence* to support the Secretary's finding. [Emphasis supplied.] *Id.* at 520-21.

The courts reach the same decision even if the Secretary's expert doctor has examined the claimant (usually one time) for the purpose of testifying. This occurred in *Sebby v. Flemming*, 183 F. Supp. 450 (W.D. Ark. 1960). The testimony of the Secretary's doctor that the claimant was not disabled conflicted with that of the claimant's doctors who had been treating him. The court said:

After reading and considering the whole of the record, the court does not find that the Referee's conclusions are supported by substantial evidence. * * *

* * * * *
The only evidence in support of the Referee's findings is the medical report of Dr. Hall, [the Secretary's doctor] based upon one examination of the plaintiff. * * * *Id.* at 454.

In *Colwell v. Gardner*, 6 Cir., 1967, 386 F. 2d 56, the Secretary's doctor, after one examination of the claimant, testified that he was not disabled. This conflicted with the evidence of the doctor who had been treating the claimant. The court held that the evidence of the Secretary's expert was not substantial evidence, and the decision of the examiner based upon it could not be sustained.

It appears from the facts in many of the foregoing cases, as well as in the one before us, and we assume in those cases being held in abeyance by the trial court, that there is a widespread practice by hearing examiners of having testifying doctors accompany them, and, in a manner of speaking, "ride the circuit" with them, for the purpose of examining medical records and reports of claimants and then testifying as experts, with or without a cursory examination of the claimants, as to their disability. This procedure should be frowned upon, if not eliminated altogether. Such testimony is not substantial evidence, and, if objected to, will not, standing alone, support a decision of the examiner adverse to the claimant. This is especially true when such testimony is in conflict with that of the claimant and his doctor who has not only examined him but has also treated him over a long period of time.

The claimant objected to the introduction into evidence of the medical reports and records of the absent doctors on the ground that they were hearsay and not substantial evidence. We agree that they were hearsay, but, as stated above, were admissible into evidence before the examiner. However, we conclude that they were not substantial evidence. The decision of the court in *Hill v. Fleming, supra*, is a case in point. The facts in that case are very similar to those in the instant case with respect to the admission of medical records and reports of absent doctors into evidence before a hearing examiner over the objection of the claimant that they were hearsay. In that case a librarian of a medical clinic was permitted by the examiner to make a report of some of the contents of the medical records of the clinic as to examinations and treatment of the claimant that were adverse to him.

The court in that case held that the librarian's report was hearsay and was not substantial evidence. The court said:

In our opinion these hearsay statements, in the light of the whole record, are not substantial evidence to negative either the plaintiff's disability or his incapacity since prior to March 31, 1948 to engage in any gainful occupation. The record as a whole leaves the conclusion of the Council and Referee on the ultimate facts without reasonable foundation. * * *

* * * * *

In our opinion this secondhand hearsay evidence submitted by the Librarian of Falk Clinic is too remote and not at all probative of the ultimate facts in issue and hence is not substantial evidence to support the conclusions and decision of the Council.

Mere uncorroborated hearsay or rumor does not constitute substantial evidence. *Consolidated Edison Co. of New York v. National Labor Relations Board*, 1938, 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed 126; *National Labor Relations Board v. Amalgamated Meat Cutters*, 9 Cir., 1953, 202 F. 2d 671, 673.

The evidence on which the Council and Referee purported to rely is not only of "small probative value" but "in relation to the type of evidence reasonably anticipated in the circumstances of the case, that very slight proof must be characterized as unsubstantial." At most it was "handpicked fragments of evidence" merely enough to raise a "suspicion".

In our opinion there was no substantial evidence to contradict the medical opinions that plaintiff was totally and permanently disabled; neither was there any affirmative evidence that he had or could have, in view of his limited education and physical condition, engaged in any substantial gainful employment. *Id.* at 244-45.

As we have already pointed out, the trial judge could have entered a judgment in favor of the claimant for disability benefits, because the only substantial evidence before him was in favor of the claimant. However, in his commendable efforts to be fair to both parties, he remanded the case to the Secretary for a full new hearing. In view of the fact that not only the instant case, but also the three cases being held in abeyance by the trial court, will be disposed of in accordance with the guidelines which we have laid down in this opinion, we conclude that the order of the trial court should be affirmed.

Accordingly, we deny the claimant's motion to dismiss the appeal and affirm the judgment of the trial court, and remand the case to the Secretary for a full new hearing before a different examiner as ordered by the trial court and in accordance with this opinion.

AFFIRMED AND REMANDED.

APPENDIX B

In the United States Court of Appeals for the Fifth
Circuit

No. 26238

WILBUR J. COHEN, SECRETARY OF HEALTH, EDUCATION,
AND WELFARE, APPELLANT

versus

PEDRO PERALES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC

(October 10, 1969)

Before COLEMAN and GOLDBERG, Circuit Judges, and
SKELTON, Judge of the Court of Claims*

PER CURIAM.

Attorneys representing the administrative Law Section of the American Bar Association have filed an Amicus Curiae Brief in this case in which they urge the court to modify its opinion so as to hold that the Administrative Procedure Act applies to and governs hearings on disability claims under social security legislation, and especially with respect to the right to cross-examination. We have carefully considered this

*Sitting by designation as a member of this panel.

brief, but have concluded that our decision in our original opinion is correct in this regard.

The Secretary of HEW has filed a Petition for Rehearing and a Suggestion of Rehearing En Banc. He has apparently misconstrued our opinion because the main thrust of his Petition for Rehearing is to the effect that under our decision uncorroborated hearsay evidence could never be substantial evidence that would support a decision of a hearing examiner adverse to a claimant in a social security disability case. Because of this erroneous interpretation of our opinion, the Secretary raises the spectre of a large increase in the number of cases of this kind that would have to be litigated in Court because of our opinion. He intimates that our decision would require medical witnesses of the HEW as well as those of the claimant to always testify in person at the hearing. All of these positions are unfounded.

Our opinion holds, and we reaffirm, that mere uncorroborated hearsay evidence as to the physical condition of a claimant, standing alone and without more, in a social security disability case tried before a hearing examiner, as in our case, is not substantial evidence that will support a decision of the examiner adverse to the claimant, if the claimant objects to the hearsay evidence and if the hearsay evidence is directly contradicted by the testimony of live medical witnesses and by the claimant who testify in person before the examiner, as was done in the case at bar. This is especially true if the claimant requests that the absent medical witnesses of the HEW who authored the hearsay evidence, be subpoenaed to testify at the hearing and the examiner fails or refuses to summon them.

When these conditions are not present, there is nothing to prevent an examiner from basing his decision, which is adverse to the claimant, on hearsay medical evidence, if such evidence has sufficient probative force to support his decision.

We are not impressed with the Secretary's argument that our opinion will cause an increased number of social security disability cases to be filed in court, as we do not believe this will happen. But even if this should be the result, it would not be persuasive. If it should become necessary for the courts to try more of these cases in order to dispose of all of them in accordance with law, they will not shirk their responsibility in this regard. We realize that the HEW is required to handle thousands of these cases each year and is no doubt anxious to simplify the procedure for disposing of them. However, each case is different from the next one and must be tried and decided on its particular facts and according to law. It is not possible for a case of this kind to be decided through a stereotyped procedure that resembles the working of a computer. A social security disability claimant and his employer have paid for his coverage under the social security law whether they wanted it or not. He should not be denied the benefits of this law solely by hearsay evidence under the conditions outlined in our opinion.

The Secretary contends that if medical witnesses are required to testify in person, this will increase the costs of the hearings and many of them will refuse to serve. If the costs are increased, they will be paid out of the social security trust fund to which the claimant has contributed. This is one of the purposes of the fund. If a doctor refuses to serve, another can

be obtained. Litigants in other types of personal injury and disability cases manage to acquire the evidence of medical witnesses. There is no reason to excuse the HEW from this requirement in a proper case. These arguments involve details that have little if anything to do with the merits of the case before us.

The Petition for Rehearing is *Denied* and no member of this panel nor Judge in regular active service on the Court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is *Denied*.

APPENDIX C

United States Court of Appeals for the Fifth Circuit
October Term, 1968

No. 26238

D.C. Docket No. Civ. 67-77-SA

WILBUR J. COHEN, SECRETARY OF HEALTH, EDUCATION,
AND WELFARE, APPELLANT

versus

PEDRO PERALES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

Before COLEMAN and GOLDBERG, Circuit Judges, and
SKELTON, Judge of the Court of Claims*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration Whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed and this cause be, and the same is hereby remanded to the Secretary for a full new hearing before a different examiner as ordered by the trial court, and in accordance with the opinion of this Court;

*Sitting by designation as a member of this panel.

It is further ordered, that appellant pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

MAY 1, 1969.

Issued as Mandate: October 22, 1969.

APPENDIX D

United States District Court, Western District of
Texas, San Antonio Division

Civil Action No. 67-77-SA

PEDRO PERALES

v.

JOHN W. GARDNER, SECRETARY OF HEALTH, EDUCATION,
AND WELFARE

ORDER REMANDING CASE

On the 13th day of February 1968, came on to be considered the motions for summary judgment filed by plaintiff and defendant; and it appearing to the Court that hearings were held on January 12, 1967 and March 31, 1967, but the only medical evidence presented, other than certain ex parte statements, was the testimony of Dr. Max Morales, Jr. and Dr. Lewis A. Leavitt. Dr. Morales testified to the effect that plaintiff, in his present condition, will not be able to continue gainful employment as a common laborer. Dr. Leavitt, who had never examined the plaintiff, after having been permitted, over objection, to interpret what other doctors had said in their written reports, concluded that the plaintiff is suffering from a low back syndrome of musculo-ligamentous origin, and of mild severity. Other evidence as to the present degree of plaintiff's physical disability was supplied by the plaintiff himself. No doctor who had personally examined plaintiff, and who had submitted a report

adverse to his interest, was called upon to testify in person.

(1) Except in unusual circumstances, and none are shown to exist in this case, the Court is reluctant to accept as substantial evidence, over objection, the opinion of a medical expert submitted in the form of a written report, the admission of which would have the effect of denying to the opposition an opportunity for cross-examination.

(2) In the opinion of this Court, the Secretary of Health, Education and Welfare should recognize the invalidity of ex parte reports from doctors as evidence having real probative value in a case. Such "evidence", when stacked up against the oral testimony of examining doctors could hardly constitute substantial evidence as contemplated by law.

(3) The critical issue as to plaintiff's present physical condition should be resolved only after current medical examinations have been conducted, and all of the examining doctors whose views are to be relied upon, in whole or in part, have been made available at the hearing in person, if either side so desires, in order that their opinions may be openly expressed and both parties may have an opportunity to question them all in a meaningful way. This does not mean that the examining doctors should not have access to medical records, as well as other doctors' reports, in arriving at their independent judgment concerning plaintiff's present physical condition, but it does mean that no medical evidence should be received and considered, over objection, unless it is of the nature and form indicated; provided, however, the parties may by agreement incorporate into the record for consideration the testimony given by any witness, medical or lay, at either of the two prior hearings.

(4) The testimony of Dr. Leavitt (called by the examiner as *his* medical adviser), which undertakes only to interpret what other doctors have said and draw conclusions therefrom, is of little or no probative value (even though the doctor is no doubt highly competent in his field), since it is apparent that the witness was not testifying in response to hypothetical questions, he had not personally examined the plaintiff, and he had made no independent determination as to plaintiff's present physical condition.

As a consequence, he could not speak from personal knowledge. If an *interpretation* of any report was called for, the proper one to perform this function would be the doctor who submitted it. This is particularly true when it is obvious that the hearing examiner in his findings has relied heavily on the opinion of the "medical adviser", who made it clear that he had never seen the plaintiff prior to his appearance at the hearing, and candidly stated: "All I can interpret is what the physicians who have examined the man over a period of months have stated". Since the *ex parte* statements "interpreted" by the medical adviser were hearsay, and the medical adviser's testimony was hearsay, his testimony amounted to pyramiding hearsay upon hearsay, which violates the fundamental rule of fair play in a "hearing".

(5) The record in this case should contain all pertinent evidence developed in a proper manner, and pursuant to the well-established rules of fairness. Inasmuch as this has not been done, this Court is of the opinion that in the interest of justice this cause should be remanded to the Secretary with instructions to assign this cause to a different hearing examiner to hear the entire matter anew. Either party should be afforded full opportunity to present competent evidence on per-

tinient issues, and findings should be made solely on the basis of the record made at the hearing before the new examiner, which record may, as indicated, contain, by agreement only, any testimony submitted at either of the prior hearings.

It is, accordingly, *Ordered, adjudged and decreed* that the motions of plaintiff and defendant for summary judgment be and they are hereby in all things, **DENIED**, the decision of the Secretary of Health, Education and Welfare denying the relief sought is **REVERSED**, and this cause is remanded to the Secretary for a full new hearing before a different examiner, at the earliest practicable time.

Entered the 13th day of February, 1968.

ADRIAN A. SPEARS,
United States District Judge.

United States District Court, Western District of
Texas, San Antonio Division

Civil Action No. 67-77-SA

PEDRO PERALES

v.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE

Counsel for Plaintiff: Richard E. Tinsman, Tinsman & Cunningham, 1907 National Bank of Commerce Building, San Antonio, Texas 78205, and Anthony J. Ferro, Attorney at Law, 812 San Antonio Savings Building, San Antonio, Texas 78205.

Counsel for Defendant: Warren N. Weir, Assistant U.S. Attorney, Post Office Box 1701, San Antonio, Texas 78206.

MEMORANDUM OPINION

This is an appeal brought under the provisions of 42 U.S.C.A. § 405(g), from a decision of the Appeals Council affirming the hearing examiner's holding that plaintiff is not entitled to any disability benefits under the provisions of the Social Security Act.

Hearings were held in San Antonio on January 12, 1967 and March 31, 1967. At the initial hearing the only witnesses were the plaintiff and a physician whose testimony was to the effect that plaintiff would not be able to continue gainful employment as a common laborer. Other evidence consisted of certain unsworn medical reports received, over objection, by the hearing examiner.

At the second hearing, although no examining physicians appeared, and there was no showing that they were unavailable, the hearing examiner heard testimony, over objection, from a "medical adviser", who had never examined the plaintiff, and did not testify in response to hypothetical questions. Nevertheless, he was allowed to interpret "what the physicians who had examined the man over a period of months have stated", and the hearing examiner, in arriving at his findings, relied heavily upon that interpretation.

Except in unusual circumstances, and none are shown to exist in this case, this Court is reluctant to accept as substantial evidence the opinions of medical experts submitted as original evidence in the form of unsworn written reports, the admission of which would have the effect of denying to the opposition an opportunity for cross-examination.¹ *Ratliff v. Cele-*

¹This is not to say that the *examining* doctors should not, under proper circumstances, have access to medical records, as well as other doctors' reports, in arriving at their independent judgment concerning a claimant's physical condition.

brezze, 338 F. 2d 978, 982 (6 Cir. 1964); *Mullen v. Gardner*, 256 F. Supp. 588 (E.D.N.Y. 1966).

Similarly, the opinion of a doctor who has never examined or treated a claimant, is entitled to little or no probative value, especially when it is opposed by evidence of a substantial nature, including the oral testimony of an examining physician. See *Hayes v. Gardner*, 376 F.2d 517 (4 Cir. 1967).

Certainly, therefore, in a situation where, as here, unsworn medical reports of examining physicians are received as original evidence on the critical issue of plaintiff's physical condition, a non-examining medical expert is then allowed to "interpret" those *ex parte* reports, and that "interpretation" forms the basis for the decision by the hearing examiner, we have what amounts to pyramiding hearsay upon hearsay, which, under the circumstances of this case, violates the fundamental rule of fair play and cannot be permitted to stand.

Since it appears that the hearing examiner, having been forewarned, deliberately ignored similar rulings made by this Court in an earlier case, the interests of justice will be better served by remanding this cause to the Secretary for a new hearing before a different examiner, at which hearing the interested parties will be afforded full opportunity to present competent evidence on all pertinent issues. New findings should then be made solely on the basis of the record made at the hearing before the new examiner, which record may, however, contain by agreement any evidence submitted at either of the prior hearings.

It has been *so ordered*.

Entered this 13th day of August 1968 at San Antonio, Texas.

ADRIAN A. SPEARS,
United States District Judge.

APPENDIX E

1. The Social Security Act, as amended, 42 U.S.C. 401 *et seq.*, provides in pertinent part:

§ 405.

(a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) * * * Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

(g) * * * The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive * * *.

2. Title 20 of the Code of Federal Regulations provides in pertinent part:

§ 404.926 Subpoenas.

When reasonably necessary for the full presentation of a case, a hearing examiner or a member of the Appeals Council, may, either upon his own motion or upon the request of a

party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents which are relevant and material to any matter in issue at the hearing. Parties who desire the issuance of a subpoena shall, not less than 5 days prior to the time fixed for the hearing, file with the hearing examiner or at a district office of the Administration a written request therefor, designating the witnesses or documents to be produced, and describing the address or location thereof with sufficient particularity to permit such witnesses or documents to be found. The request for a subpoena shall state the pertinent facts which the party expects to establish by such witness or document and whether such facts could be established by other evidence without the use of a subpoena. Subpoenas, as provided for above, shall be issued in the name of the Secretary of Health, Education, and Welfare, and the Social Security Administration shall pay the cost of the issuance and the fees and mileage of any witness so subpoenaed, as provided in section 205 (d) of the act.

§ 404.927 Conduct of hearing.

Hearings shall be open to the parties and to such other persons as the hearing examiner deems necessary and proper. The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the hearing examiner believes that there is relevant

and material evidence available which has not been presented at the hearing, the hearing examiner may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing.